SUPREME COURT, U. S.

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 841

MONSANTO COMPANY,
ROTARY DRILLING SERVICES, INC.,
and PETE BARTLETT,

Petitioners,

v.

CHEROKEE LABORATORIES, INC.,

Respondent.

REPLY TO PETITIONS OF MONSANTO, ROTARY AND BARTLETT FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent, Cherokee Laboratories, Inc., presents this Reply to the Petition for Writ of Certiorari filed by Monsanto Company, Rotary Drilling Services, Inc., and Pete Bartlett.

QUESTION PRESENTED

Petitioners' statement of the question presented is deceptive. Both Petitions seek to convey the impression that the opinion of the Fifth Circuit Court of Appeals restricts valid patent rights, and involves basic patent law. This is incorrect.

As the Fifth Circuit notes, the patent question is wholly immaterial. The patent rights were fully exhausted prior to the imposition of the trade restraints and monopolistic control which the Court found violative of the anti-trust laws.

The question here presented should be more properly framed: Will a combination and agreement which creates a monopoly in a particular field of commerce (wholly unrelated to any patent possessed by any of the Petitioners) and which has the effect of suppressing and eliminating competition from the field, thereby excluding a competitor (the Plaintiff, Cherokee Laboratories, Inc. which actually developed the market for the product), be deemed violative of Sections 1 and 2 of the Sherman Act where the facts show such combination and monopolization to be in unreasonable restraint of trade, and where public injury is established?

STATEMENT

The Statement of Facts contained in the opinion of the Fifth Circuit Court of Appeals is correct. The Statements contained in the Petitions for Writ of Certiorari need to be read in light of the Statement of Facts in the Court of Appeals opinion, since they are incomplete in certain respect. In addition, such statements indicate that Rotary Drilling Services was an "agent" of Monsanto Company, and that Monsanto gave Rotary a "license" under its patent to market the product in question. This is not correct.

The facts of this case reveal a particularly brutal and oppressive use of monopoly power created through combination. Rotary, essentially a one man concern, secured an exclusive sales agreement from Monsanto covering oil field distribution of Lytron 886, the beneficial use of which in the oil well drilling industry was then relatively unknown. Cherokee, with an established and active sales force, undertook the promotion of the product. After approximately two years of development, the product became established as a result of Cherokee's effort. It was then that Rotary decided to eliminate Cherokee from the market, through the use of the monoply position acquired through the combination of the exclusive sales agreement with Monsanto and license under a patent obtained by Pan American Petroleum Corporation covering the unique combination of uses of the product in the oil well drilling field. Since no other product was licensed by Pan-Am under the "use" patent, and Rotary had the only supply of the product for use in the oil field by virtue of the contract with Monsanto, the monoply position was doubly insured. After deciding to make use of the monopoly power, Rotary at first refused to sell to Cherokee, then agreed to sell upon terms which made competition impossible. Rotary then proceeded to pirate the sales force of Cherokee. Monsanto had an opportunity to prevent the elimination of Cherokee by the market by simply selling both to Rotary and Cherokee, but refused to do so. With full knowledge of the facts, according to Monsanto's own testimony, the exclusive agreement with Rotary was renewed on January 28, 1963, although there was no obligation to renew the agreement. Prior to the renewal, Chero-

kee had advised Monsanto of the actions of Rotary, and had attempted to purchase from Monsanto, but was refused the right to do so. Monsanto was completely aware that its action would certainly result in the elimination of Cherokee from the market. In addition, the evidence shows that Monsanto closely scrutinized and "policed" all sales to insure that none of the product sold to others for non-oil field use would be resold, marketed or used in the oil field in competition with Rotary. As an inevitable result, Cherokee was eliminated from the market it had developed.

REASONS FOR REFUSING THE WRIT

1. The Patent Argument

Basically, both Petitions for Writ of Error attempt to persuade this Court that this is actually a patent case, and that the Fifth Circuit has erroneously applied anti-trust laws to restrict valid patent rights.

Nothing could be further from the truth. In actuality, the Petitioners never proved by competent evidence adduced in Court that Monsanto did in fact have a patent on the product Lytron 886. Disregarding this, however, the facts clearly show that Monsanto's patent, if it does exist, is completely immaterial. As the Fifth Circuit points out, the Court need go no further than the starting point. The starting point, i.e., the first sale, which completely exhausts the patent rights, and the following equally valid reasons completely refute the Petitioners' argument.

(a) Monsanto has not granted a license of any part of its patent rights to Rotary; therefore, the fact that Monsanto has a patent is immaterial.

Monsanto simply has entered into an exclusive selling contract with Rotary. It did not grant an assignment of any patent rights to Rotary, nor did it license Rotary under the patent. See Section 242, 69 C.J.S., Patents; and definition of assignment, Section 220, ibid.

A contract giving an exclusive right to sell a patented article which makes no mention of patents, patent licenses, royalties, or anything else, to indicate that it is a license is as a general rule governed and controlled by the general law in respect to its requisites and validity, construction and operation, performance or breach, and the remedies of the parties thereon. See 69 C.J.S. *Patents*, Section 274, page 834. Clearly, therefore, the agreement in this case, having none of the attributes or characteristices of a license, is to be judged in light of the "general law" i.e., the Sherman Anti-Trust Act.

(b) *The agreement between Rotary and Monsanto was not reasonably designed to secure the patent reward, but inured to Rotary's benefit and is beyond the scope of the patent privilege.*

The patent monopoly extends only to manufacture, use and sale of a patented article. It is designed to develop the useful arts by encouraging invention. See *U. S. v. Timken Roller Bearing Company*, 83 F. Supp. 284 (1949). Only the inventor is intended to be rewarded by the patent. Thus, the

sale of a patented article by the patentee secures the pecuniary reward to the inventor and exhausts the patent monopoly in the article. See *United States v. Univis Lens Co.*, 316 U.S. 241, 86 L. Ed. 1408 (1942) and *U. S. Ethyl Gasoline Corp.*, 27 F. Supp. 959. An agreement which inures to the benefit of the licensee or non-patent holder and restricts trade is condemned by the Sherman Act. This is illustrated by the case of *United States v. Crown Zellerbach*, 141 F. Supp. 118 (1956) in which the Court states at page 127:

> "Restraints upon competition for the benefit of the licensee are to be measured not by the standards of the patent laws, but by the general rules governing the validity of competitive restrictions attached to the conveyance of personal property * * * by serving the interest of Crown, (the licensee) and not Alsco (the licensor) the agreement presents a genuine and triable issue under the Sherman act."

In this case, the agreement between Monsanto and Rotary, even if it could be construed as a license, operated for the benefit of Rotary and not Monsanto, which by the sale of the product exhausted its patent monopoly. The agreement restricts competition, not in Monsanto's favor, but in favor of Rotary by giving the latter a monopoly in a field that did not come within the scope of the patent grant. Clearly, therefore, the combination between Monsanto and Rotary is to be judged under the Sherman Act.

(c) *The agreement between Rotary and Monsanto cannot be used to extend the patent monopoly or to restrain trade.*

A patent may not be used to extend control over or to monopolize a product, process, device, combination, com-

position, or use which is not within the scope of the patent grant. *Mercoid Corporation v. Mid-Continent Investment Company*, 320 U.S. 661, 88 L. Ed. 376 (1943); *U. S. v. Masonite*, 316 U.S. 65, 86 L. Ed. 1461 (1942); and *Barber-Colman Company v. National Tool Company*, 136 F. 2d 339. In this case the patent asserted by Monsanto pertains to a product, but the agreement between the Petitioners resulted in a restraint of trade and a monopoly in a particular and unique use area which is wholly foreign to Monsanto's patent and which is, in fact, defined by a separate patent. This amounts to an unlawful extension of the patent monopoly into a field not covered by the patent.

In addition, disregarding the question of monopoly extension, a patent may not be used to restrain trade except as necessarily incident to realization of the pecuniary reward by the patentee. *U. S. v. Timken Roller Bearing Company*, 83 F. Supp. 284 (1949). Assuming the applicability of the Monsanto patent, such patent, insofar as pertinent, only gave Monsanto the exclusive right to make and sell Lytron 886. After having exercised such right, Monsanto could not lawfully enter into an agreement the direct effect of which was to control subsequent trade and commerce, that is, subsequent sales in a field which obviously did not come within the scope of the patent. Monsanto has no patent rights in the use area in which a monopoly has been created and in which competition has been suppressed.

Likewise, Monsanto had no right to "police" the ultimate market, which was first serviced by Cherokee and then by Rotary after elimination of Cherokee. Monsanto

went to great lengths to insure that no sale to a customer other than Rotary (for non-oilfield use) would find ultimate distribution in the oilfield industry in competition with Rotary. The evidence is replete with instances in which this occurred.

Monsanto's lawful monopoly, if any it has, was exhausted with its sale to Rotary. Therefore, the "terminal result" of the agreement with Rotary brings it within the ambit of Sections 1 and 2 of the Sherman Act. On this point, see also *United States v. Vehicular Parking*, 54 F. Supp. 828 (1944). It is obvious that the restraint present in this case results from the combination with Rotary and not from lawful exercise of any patent rights by Monsanto.

(d) *If the agreement between Rotary and Monsanto be considered a license, then the Petitioners are guilty of a prohibited form of cross-licensing.*

Rotary is a non-exclusive licensee under a Pan American use or application patent. Lytron 886 is the only product ever approved by Pan American under this patent. Therefore, by giving Rotary an exclusive on the product in the oilfield industry, a monopoly has been created in Rotary which is completely beyond the scope of either the Rotary license or the alleged Monsanto patent, i.e., a monopoly on sales and distribution of the product (not patented by Pan American) for use or application in the oil industry (not covered by the Monsanto patent.)

Cross-licensing of patents, thereby extending the patent monopoly possessed by the cross licensee in such a way as

to restrain trade or monopolize or tend to monopolization is illegal and within the prohibition of the Sherman Act. See *United States v. Line Material Company*, 333 U.S. 287, 68 S. Ct. 550, 982 L. Ed. 701 (1948); *Clapper v. Original Cab Company*, 165 F. Supp. 565; *U.S. v. Krasnov*. 143 F. Supp. 184, affm'd 355 U.S. 5.

Thus, for several reasons, it is obvious that any appeal to this Court based upon a patent argument is wholly without merit.

2. The Economic Argument

Monsanto appeals to this Court for "guidance" in its marketing policies. This approach is as unique as the combination of functions performed by the product Lytron 886 when used as a drilling mud additive.

Having formed a combination which is in unreasonable restraint of trade, and which creates a monopoly, in violation of Sections 1 and 2 of the Sherman Act, Monsanto, or Rotary for that matter, can hardly be heard now to appeal for absolution on the basis that they are entitled to this Court's advice on marketing policies without having imposed upon them the sanctions of the anti-trust laws.

The attempt to foister upon this court a "good intent in selecting marketing system" argument, and to convey the impression that the Fifth Circuit's opinion has "far reaching consequences" with respect to marketing of various products through exclusive distributors, is wholly specious. The fallacies in this approach are readily apparent.

In the first place, proof of a specific intent to violate the anti-trust laws is not necessary. In the second place, the fact situation in this case is so unusual and novel that the decision can have effect only upon these parties, the product involved, and this particular marketing system. This is not a case of selection of an exclusive distributor to market one of a competitive number of products in a fungible market. It is a situation where an exclusive distributorship created a monopoly and caused the elimination of the very company which created and developed the particular market involved. The contention that this was in good faith is an affront to credibility when consideration is given to the highly unfair competitive practices employed by Rotary and Pete Bartlett, and the fact that Monsanto renewed its exclusive agreement with full knowledge of the employment of these tactics by Rotary and Bartlett, and with equally complete knowledge that the renewal of the exclusive arrangement and the refusal to sell to Cherokee would cause the elimination of the one company responsible for development of the oil field market for the product.

3. Violations of the Anti-Trust Laws.

In conclusion, the Applications for Writ of Certiorari should be refused because the Court of Civil Appeals correctly held that there was evidence of violations of the anti-trust laws consisting of (1) unreasonable restraints of trade through combination to the public injury and detriment, (2) monopolization of a particular product market, also created through combination, (3) the illegal suppression and elimination of competition, and (4) a concerted re-

fusal to deal. The latter two constitute *per se* violations. The basis for the lower court's holding is well expounded in the opinion, and well documented by the authorities cited by the Court, and needs no repetition.

CONCLUSION

For the foregoing reasons, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Reply to Petitions for Writ of Certiorari has been served upon each respective attorney of record for the petitioners by depositing the same in the United States mail, first class, postage prepaid, properly addressed on the 3rd day of January, 1967.

Jack N. Price